IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 8TH DECEMBER 2006 / 17TH AGRAHAYANA 1928

CRL.A.No. 2011 of 2005()

SC.302/2005 of FIRST ADDL.SESSIONS COURT, ERNAKULAM

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APPELLANT: ACCUSED.

SALIM @ FREEK SALIM, S/O.IBRAHIM,
AGED 38 YEARS, KOCHUPARAMBIL HOUSE, H.NO.V/285,
BAZAR ROAD, MATTANCHERRY.

BY ADV. SRI.PEEYUS A.KOTTAM
SRI.ASHIK K.MOHAMMED ALI

RESPONDENT: COMPLAINANT.

STATE OF KERALA, REPRESENTED BY THE
CIRCLE INSPECTOR OF POLICE, PALLURUTHY,
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM.

BY P.P.SRI. C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 2011 of 2005 A

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Dated this the 8th day of December, 2006

JUDMENT

Appellant was accused in S.C.No.302/2005 on the file of the Court of the First Additional Sessions Judge, Ernakulam. He faced trial for an offence punishable under section 22(b) the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as `the Act'. To prove the case against the appellant, PW1 to 6 were examined and Exts.P1 to P11 were marked. Exts.MO1 to MO7 were also marked. After closing the evidence the appellant was questioned under section 313 of the Cr.P.C. He denied the allegation levelled against him and stated that he was innocent and the case was foisted against him. On accepting the evidence of the prosecution, the trial court found that the appellant guilty under section 22(b) of the Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.5,000/- and in default to undergo simple imprisonment for a further period of six months. The above conviction and sentence are assailed in this appeal.

2. Heard learned counsel for the appellant as well as the learned Public Prosecutor.

3. Learned counsel for the appellant submits that even accepting the evidence of the prosecution witnesses, the conviction and sentence ordered against the appellant are not sustainable in law.

4. The prosecution evidence adduced against the appellant consists PW1, PW2, PW3, PW5 and PW6. PW1 is a social worker who had given information to PW4, Sub Inspector of Police, that the appellant was in possession of contraband article. On getting information, PW5 and party proceeded to the spot. On seeing the police jeep, the appellant ran towards west and the police party chased him and brought him back. On examination he was found in possession of 12 ampules of Buprenorphine and 4 ampules phenergan. Samples were taken for analysis in the presence of the witnesses. The materials were seized on the basis of Ext.P1 mahazar. Thereafter, the appellant was arrested and on the basis of Ext.P1, PW4 registered the crime. In Ext.P11 chemical analysis report it is stated that "**Supernorphine was detected in the ampules and the ampules contained 0.28 milligrams of Buprenorphine as Buprenorphine hydrocholoride perone milli litre of the preparation."** PW3 , the Excise C.I. stated that he was requested his presence for conducting the body search of the appellant. He also stated that he himself introduced to the appellant and other witnesses. He further stated that PW4 conducted the

body search of the appellant and seized the contraband articles. PW5 who completed the evidence filed the charge before the court. Considering the facts and circumstances of the case, this Court is of the view that the trial court is fully justified in placing reliance on the evidence adduced by the prosecution. Hence, the findings entered by the trial court would not require any interference by this Court.

5. The contention of the learned counsel for the appellant is that if the entire prosecution case is accepted, the conviction under section 22(b) of the Act is not sustainable as per the dictum laid down by the Apex Court reported in Ouseph @ Thankachan V. State of Kerala (2004)4 SCC 446. In the above decision the Apex Court had considered the question of "small quantity". In paragraph 8 it is stated as follows:-

> "8. The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words "small quantity" have been specified by the Central Government by the notification dated 23-7-1996. Learned counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampule contained only 2 ml. And each ml. Contains only 3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification."

The above decision was followed by this Court in Siyad V. State of Kerala, 2005(4) KLT 590. In Siyad's case (Supra) this Court held that **"considering the preparation seized as a whole is not commercial quantity or small quantity under item 239 read with item 169 and offence, if proved, will not come as under S.22(c) or 22(a) but only under S.22(b)".** The prosecution case is that the appellant was found in possession of 12 ampules of Buprenorphine and 4 ampules phenergan. Considering the principles laid down by the Apex Court, this Court is of the view that the contraband article seized from the appellant is "small quantity". Hence, the offence committed by the appellant would fall under section 22(a) of the the Act.

6. In the circumstances, the conviction entered against the appellant in S.C.No.302/2005 on the file of the Court of the First Addl. Sessions Judge, Ernakulam, under section 22(b) of the Act is altered to section 22 (a) of the Act. Hence, the petitioner is found guilty under section 22(a) of the the Narcotic Drugs and Psychotropic Substances Act, 1985 and he is convicted thereunder and sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs.3,000/- and in default to undergo simple imprisonment for three months. It is reported that the petitioner has already suffered imprisonment for more than one year and six months.

Hence, this Court limits the sentence as to the period which he had undergone. Therefore, the appellant may be released forthwith unless required in any other case.

The appeal is partly allowed.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No. 2074 /2005

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Gist of the Judgment

13-11-2006